

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

PCHB No. 79-24

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of seven \$250 civil penalties for emissions allegedly in violation of Sections 9.04 or 9.11 of respondent's Regulation I, came on for hearing before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, Chris Smith, and David A. Akana, convened at Tacoma, Washington on May 22, 1979. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by its attorney, Edward M. Lane. Respondent appeared by its attorney, Keith D. McGoffin. Reporter Gene Barker

WAF/LB

1 reported the proceedings.

2 Witnesses were sworn and testified. Exhibits were examined.  
3 From testimony heard and exhibits examined, the Pollution Control  
4 Hearings Board makes these

5 FINDINGS OF FACT

6 I

7 Respondent, pursuant to RCW 43.21B.260, has filed with this Board  
8 a certified copy of its Regulation I containing respondent's regulations  
9 and amendments thereto, of which official notice is taken.

10 II

11 Appellant, Kaiser Aluminum, is a commercial tenant on Pier 7 of  
12 the Port of Tacoma. There appellant owns and operates a transshipment  
13 facility for receiving alumina from ships and loading it into railcars  
14 for delivery to other places. Alumina is moved from storage domes  
15 through a system of chutes and conveyors to appellant's "loadout facility",  
16 a smaller storage structure which straddles a rail line and fills the  
17 rail cars below via a flexible spout. The alumina exists as a dust,  
18 slightly finer than table salt, and is physically abrasive.

19 III

20 Complainants are employees of Totem Ocean Trailer Express, Inc.  
21 (TOTL) or its stevedore company. These employees are assigned to a  
22 converted trailer used as a check point for TOTE semi-trucks and trailers  
23 which regularly and frequently follow a route between the TOTE trailer and  
24 appellant's loadout facility. The latter two structures are some  
25 60 feet apart. TOTE is also a commercial tenant of Port of Tacoma  
26 and holds a right to use both the truck route and the site of the

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1 trailer, although the same are within the outer boundaries of appellant's  
2 leasehold.

3 IV

4 On January 5, 1979, alumina dust leaked from the conveyor and spout  
5 of appellant's loadout facility, became airborne, and was deposited on  
6 the TOTE truck route. This, aided by a 15 mile per hour wind and the  
7 routine passage of TOTE trucks, blew through the air causing eye or  
8 respiratory system irritations in four employees assigned to the TOTE  
9 trailer. The alumina dust came off the conveyor even when not loading  
10 and fell like a "light snowfall". The alumina dust entered the TOTE  
11 trailer when the doors were opened and also settled onto the cars of two  
12 TOTE employees parked some 100 feet or more from appellant's loadout  
13 facility. The alumina dust imparted a distinctive white coating on  
14 the cars.

15 On the day in question, 3-5 tons of alumina dust lay on the  
16 ground at the base of the loadout facility. This amount is not  
17 uncommon. On that day 1200 tons of alumina had been loaded into rail  
18 cars and in the prior four days 14,000 tons of alumina had been  
19 loaded.

20 V

21 Respondent received a telephoned complaint from complainants on  
22 the morning of January 5, 1979. Respondent's inspector arrived at the  
23 scene at 2:30 p.m., and also experienced eye irritation from the alumina  
24 dust while at the TOTE trailer. At least six persons at the TOTE trailer  
25 executed written complaint forms and returned them to respondent's inspector  
26 The inspector related this in conversation with appellant's Service

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1 Superintendant at 3:30 p.m. that day. Appellant later received one  
2 Notice of Civil Penalty (No. 4120) citing violation of respondent's  
3 Section 9.04 (particulate matter deposited upon real property of others)  
4 and assessing a civil penalty of \$250. Appellant also received six  
5 Notices of Civil Penalty (Nos. 4121 - 4126) citing violation of  
6 respondent's Section 9.11 (detriment to person) and assessing six civil  
7 penalties of \$250. Each of these six notices under Section 9.11 set  
8 forth as the time of violation, the time when the complainant signed the  
9 written complaint corresponding to the notice.

10 From these Notices of Civil Penalty, appellant appeals.

11 VI

12 The appellant's loadout facility is overseen by one operator to  
13 whom the alumina on the TOTE truck route would be plainly visible.

14 We take official notice that we have affirmed civil penalties  
15 for alumina dust emissions from this loadout facility, or rail cars  
16 loading at it, on two prior occasions: Kaiser Aluminum v. PSAPCA,  
17 PCHB No. 1017 (1976) \$250 affirmed but suspended, reversed on appeal  
18 Superior Court Pierce County, Cause Numbers 251632 and 256239.  
19 Kaiser Aluminum v. PSAPCA, PCHB No. 78-114 (1978), \$250 affirmed.

20 VII

21 Any Conclusion of Law which should be deemed a Finding of Fact  
22 is hereby adopted as such.

23 From these Findings, the Board comes to these

24 CONCLUSIONS OF LAW.

25 I

26 Section 9.04 of respondent's Regulation I provides that:

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1 It shall be unlawful for any person to cause  
2 or allow the discharge of particulate matter which  
becomes deposited upon the real property of others,  
except as follows:

3 (1) When such emissions are proved by such  
person to be in compliance with Section 9.09.

4 (2) Temporarily due to breakdown of equipment,  
provided that repairs are promptly made.

5 (3) During the time for compliance with this  
6 Regulation fixed by the Control Officer or the Board.

7 Compare State Department of Ecology WAC 173-400-040(2).

8 "Particulate matter" means any material, except water in an uncombined  
9 form, that is or has been airborne and exists as a liquid or a solid  
10 at standard conditions. Section 1.07(w) of Regulation I. Appellant's  
11 alumina dust is thus particulate matter in this case. It was discharged  
12 from the loadout facility over which appellant had exclusive control.

13 It became deposited on real property in which TOTE had a right  
14 of use accorded it by the Port of Tacoma as allowed by the Port's  
15 lease to appellant. We conclude that appellant therefore caused or  
16 allowed the discharge of particulate matter which becomes deposited  
17 upon the real property of others in violation of respondent's Section  
18 9.04 of Regulation I. (No. 4120).

19 II

20 Section 9.11(a) of respondent's Regulation I provides that:

21 (a) It shall be unlawful for any person to  
22 cause or permit the emission of an air contaminant  
or water vapor, including an air contaminant whose  
23 emission is not otherwise prohibited by this Regulation,  
if the air contaminant or water vapor causes detriment  
24 to the health, safety or welfare of any person, or  
causes damage to property or business.

25 . . . .

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1 Compare State Department of Ecology WAC 173-400-040(5).

2 "Air contaminant" is defined to include particulate matter,  
3 Section 1.07(b) of Regulation I, and thus includes appellant's alumina  
4 dust in this case. "Emission" is a release into the outdoor atmosphere  
5 of an air contaminant. Section 1.07(j); RCW 70.94.030(8). Air pollution  
6 is defined as:

7 . . . presence in the outdoor atmosphere of  
8 one or more air contaminants in sufficient quantities  
9 and of such characteristics and duration as is, or  
10 is likely to be, injurious to human health, plant or  
animal life, or property, or which unreasonably  
interfere with enjoyment of life and property. Section  
1.07(c). RCW 70.94.030(2).

11 Section 9.11(a) thus makes "air pollution" unlawful. Therefore,  
12 when dust or other particulate matter is present in the outdoor  
13 atmosphere in sufficient quantities and of such characteristics  
14 and duration as is, or is likely to be, injurious to human health,  
15 plant or animal life, or property, or which unreasonably interferes  
16 with enjoyment of life and property, Section 9.11(a) is violated.  
17 It matters not, for purposes of finding a violation under Section 9.11(a),  
18 that a polluter has taken all reasonable precautions to prevent  
19 material from becoming airborne. (See, for comparison, Section 9.15)  
20 Cudahy Co. v. PSAPCA, PCHB No. 77-98 (1977).

21 Thus, Section 9.11(a) does not prohibit every emission not otherwise  
22 prohibited, but only those which cause detriment to person or damage  
23 to property. Thus, a finding of detriment to several persons can mean  
24 several violations equal in number to the number of persons who have  
25 suffered detriment. Viewed in that light, Section 3.29 of respondent's  
26 Regulation I clearly provides for:

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1 . . . a fine in an amount not to exceed two  
2 hundred fifty dollars per day for each  
3 violation. Each such violation shall be a  
4 separate and distinct offense . . . (Emphasis added)

5 We conclude that a separate violation occurs as to each person who  
6 suffers a detriment to health, safety or welfare or incurs damage to  
7 property even though the air contaminant emanates from but a single  
8 source. Lloyds of Washington, Inc. v. PSAPCA, PCHB No. 1116 (1977).

9 Respondent must prove its case by a preponderance of the evidence.  
10 In weighing the evidence presented, we conclude that appellant caused  
11 or permitted the emission of particulate matter from its facility which  
12 was a detriment to the welfare of four persons at the TOTE facility  
13 in that it unreasonably interfered with their enjoyment of life and property.  
14 The same constitutes four violations of respondent's Section 9.11(a) of  
15 Regulation I. (Nos. 4121, 4122, 4123, 4126). Respondent alleged but  
16 failed to prove detriment to two other persons. (Nos. 4124 and 4125).

### 17 III

18 Appellant contends that respondent has set the exclusive time  
19 of violation by the hour and minute appearing on each Notice of Civil  
20 Penalty, and accordingly must prove a violation at that hour and minute.  
21 We disagree as to the regulations and notices at issue. Respondent need  
22 only describe the violation with reasonable, and not exact, particularity.  
23 RCW 70.94.431. The proof revealed no difference in circumstances which  
24 would prejudice appellant in defending against a violation alleged to  
25 have occurred at the latest time shown on a notice of penalty, 3:13 p.m.,  
or earlier that same day.

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IV

We notice the judgment of the Superior Court of Pierce County in Cause Numbers 251632 and 256239 which concludes that Sections 9.03(b) and 9.15(a) of Regulation I are invalid and unenforceable because of the omission of the scienter requirement. In the instant matter, however, we conclude that Sections 9.04 and 9.11(a) are valid and enforceable despite the omission of scienter for the reasons stated in our decision in Kaiser Aluminum and Chemical Corp., et al. v. PSAPCA, PCHB No. 1017 (1976).

V

The amount of civil penalty assessed for each violation is reasonable under the circumstances.

VI

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board issues this

ORDER

Five \$250 civil penalties (Nos. 4120, 4121, 4122, 4123, 4126) are each hereby affirmed. Two \$250 civil penalties (Nos. 4124 and 4125) are each hereby vacated.

DONE at Lacey, Washington this 25<sup>th</sup> day of June, 1979.

POLLUTION CONTROL HEARINGS BOARD

Dave S. Mooney  
DAVE S. MOONEY, Chairman

Chris Smith  
CHRIS SMITH, Member

David Arana  
DAVID ARANA, Member

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